United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76 2104

To be argued by:
RICHARD M. ZUCKERMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BILL LAM, a/k/a LAM MAN CHUNG,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

B
P/S

BRIEF OF PETITIONER-APPELLANT
AND
APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

BILL LAM, a/k/a LAM MAN CHUNG. :

Petitioner-Appellant, :

-against- : Docket No. 76-2104

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BRIEF OF PETITIONER-APPELLANT

This is an appeal by petitioner-appellant Lam Man Chung ("Lam" or "petitioner") from an order of the United States District Court (Werker, J.) entered July 9, 1976, denying petitioner's motion, pursuant to 28 U.S.C. § 2255, to vacate his guilty plea and sentence. The grounds of the motion were that the joint representation of petitioner and his co-defendant by the same attorney denied petitioner effective assistance of counsel.

Petitioner Lam submitted this motion pro se. The Hon. Murray I. Gurfein, C.J.,* to whom the motion was initially

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* Judge Gurfein had presided at petitioner's plea and sentencing when he was a District Judge. Judge Gurfein was therefore designated to sit as a District Judge to hear the Section 2255 motion. Rule 9(A), Individual Assignment and Calendar Rules, United States District Court for the Southern District of New York.

assigned, issued a Memorandum Opinion April 6, 1976, holding that petitioner's claim of denial of effective assistance of counsel could not be determined upon the files and records of the case, because the District Court had accepted petitioner's guilty plea without inquiring into the possible conflict of interest. A copy of that opinion is included in the Appendix annexed hereto, as pages A-1 through A-6. Judge Gurfein ordered that a hearing be held, and appointed the undersigned counsel, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, to represent the petitioner at the hearing. The case was subsequently reassigned to the Hon. Henry F. Werker, D.J., who conducted the hearing on June 22, 1976, and issued an Opinion, entered July 9, 1976, denying petitioner's motion. A copy of Judge Werker's opinion is included in the Appendix annexed hereto, as pages A-7 through A-11.* Neither opinion is reported.

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* Pursuant to Rule 30(f), Fed. R. App. Proc., and Section 30(2) of the Rules of this Court, this in forma pauperis appeal is being heard on the original record, without an appendix other than copies of the District Court opinions. Pursuant to Section 30(2), copies of the reporter's transcript of the June 22, 1976 hearing are being filed with the Clerk.

QUESTIONS PRESENTED

1. Whether petitioner's counsel had a conflict of interest where petitioner's counsel, who also represented a co-defendant, understood that the United States Attorney and the Court would not accept a plea of guilty from the co-defendant, whom he had advised to plead guilty, if the petitioner went to trial.

The District Court concluded that there was no conflict of interest.

2. Whether petitioner was denied effective assistance of counsel where petitioner pled guilty upon the advice of counsel who had already advised a co-defendant to plead guilty, and who believed that the co-defendant's guilty plea would only be accepted if petitioner also pled guilty.

The District Court concluded that petitioner was not denied effective assistance of counsel.

STATEMENT OF FACTS

Petitioner Lam and co-defendant Szeto To Suey Nom ("Szeto") were among six defendants named in indictment 73 Crim. 443 filed May 11, 1973. Petitioner and Szeto were both charged with conspiracy to violate 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A) (the Drug Abuse Prevention and Control Act), and with substantive violations of those statutes.

Petitioner Lam retained Gustave Gerber ("Gerber"), the only lawyer whom he knew (H. Tr. 7),* to represent him in the proceedings. Szeto subsequently retained Gerber as well (H. Tr. 8), and Gerber testified that he thought that Lam had introduced him to Szeto (H. Tr. 65-66; A-8).

Even though Gerber knew that petitioner Lam and co-defendant Szeto were indicted for allegedly conspiring with each other (H. Tr. 86-87), Gerber did not explain to Lam that there was a potential conflict of interest, and did not inform Lam that he had a right to separate counsel (H. Tr. 9). The District Court found that Gerber "never discussed conflict of interest with these men" (H. Tr. 69; A-10).**

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* References to (H. Tr.) are to the transcript of the Hearing held June 22, 1976.

** References to (A-) are to the Appendix, annexed hereto, containing the opinions of the Court below.

Gerber testified, and the District Court found (A-9), that it was his understanding in multi-defendant cases that it was the policy of the United States Attorney and the Court not to accept a guilty plea from one defendant if another defendant pled "not guilty," unless the defendant pleading guilty would "turn ... State's evidence." (H. Tr. 90-93). He based this understanding on "many years of practice," and understood that this was the practice in "both State and Federal" courts (H. Tr. 90). Gerber also testified that he operated with this understanding in his representation of Lam and Szeto (H. Tr. 90).

On May 14, 1973, both petitioner and Szeto appeared in Court, represented by Gerber, to enter their pleas. The pleas for both defendants were entered in response to a single question from the Court:

> THE COURT: How do you plead?
>
> MR. GERBER: Not guilty.
>
> THE COURT: Is that a plea for each, Mr. Lam and Mr. Nom [i.e., Mr. Szeto]?
>
> MR. GERBER: Yes.

Transcript, May 14, 1973, at 2. Trial was scheduled for May 31, 1973.

Before advising Lam whether to change his plea to guilty, or go to trial, Gerber determined that he would advise Szeto to plead guilty (H. Tr. 12, 69, 72). He based this advice primarily on the fact that Szeto had been arrested with narcotics in his possession. Gerber testified, "there was no question about the possession by Szeto." (H. Tr. 72).

Gerber then began, in his words, "to crowd Mr. Lum"* into a decision to plead guilty (H. Tr. 75, 85). Lam testified that Gerber told him, when he gave him this advice, that if Lam went to trial, it would "hurt Szeto" (H. Tr. 15). Gerber denied that he advised Lam to plead guilty to benefit Szeto (H. Tr. 85), but also testified that he understood that the Court and the United States Attorney would not accept Szeto's guilty plea unless Lam also pled guilty (H. Tr. 92-94).

On the morning of May 31, 1973, the day the trial was scheduled to commence, Gerber again appeared on behalf of both defendants. At that point, Szeto had decided to change his plea to guilty (H. Tr. 17, 87). Lam testified that he intended to go to trial (H. Tr. 16-17), but Gerber testified that Lam "accepted the inevitability and advisability of pleading guilty." (H. Tr. 88).

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* Gerber testified that he knew the petitioner as "Bill Lum" (H. Tr. 83), and referred to Lam by that name in his testimony.

Although Gerber appeared for both defendants on the morning of trial, the Court did not ask Gerber whether there was a potential conflict of interest in the joint representation. Nor did the Court address either defendant on the subject.

Shortly after both the Government and the defense stated that they were ready to proceed to trial, Gerber informed the Court that Szeto would plead guilty to two counts of the indictment, both of which charged possession of narcotics with intent to sell (P. Tr. 4).* Upon questioning by the Court, Szeto denied that he intended to sell the narcotics (P. Tr. 14). The Court thereupon declined to accept the guilty plea, because it was without a factual basis (P. Tr. 14).

A jury panel was then sworn (P. Tr. 15).

Immediately after the jury panel was sworn, Gerber approached the bench to inform the Court that he was attempting to convince both of his clients -- petitioner Lam and co-defendant Szeto -- to plead guilty. The following colloquy ensued:

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* References to (P. Tr.) are to the transcript of proceedings on May 31, 1973, when Lam and Szeto's guilty Pleas were entered.

MR. GERBER: The way it is developing, we spent a lot of time on it and I am beginning to get across to Lam the fact he ought to plead to the seventh count because the Government's position I regard as being rather considerate to let him plead to that and get away with it.

THE COURT: That's Bill Lam?

MR. GERBER: Yes.

Under those circumstances maybe I can get the other guy to tell you he did try to make that sale, that it was for the purpose of getting the sale.

(P. Tr. 15-16) (emphasis added).

Gerber asked the Court to adjourn the selection of the jury, so that he could persuade Lam and Szeto to plead guilty (P. Tr. 16). When the Court instructed the attorneys to pick a jury, Gerber objected, stating:

MR. GERBER: We can get rid of it, Judge.

(P. Tr. 16).

A jury was then impaneled and sworn, and Assistant United States Attorney Robert Walton presented his opening argument (P. Tr. 18-26).

Before Gerber was to present his opening argument for Lam and Szeto, the Court adjourned for lunch. The Court instructed Walton to give Gerber the "3500 material," pursuant to 18 U.S.C. § 3500, which he did (P. Tr. 27-28).

Upon returning from the luncheon recess, Gerber addressed the Court, and informed the Court that Lam would plead guilty to Count 7 of the indictment, and Szeto would plead guilty to Counts 3 and 8, all of which charged possession of narcotics with intent to distribute. The following colloquy occurred:

> MR. GERBER: If Your Honor please, the defendants are present, the attorney for the Government, and myself.
>
> I have had an opportunity during the luncheon period to go over some of the facts and they have become knowledgeable as a result of the 3500 material.
>
> Using that information it gave me better leverage in discussing the possible disposition with the two defendants that are now before you.
>
> THE COURT: You don't mean "leverage".

(P. Tr. 29) (emphasis added).

Thereafter, the Court accepted guilty pleas of both petitioner Lam and co-defendant Szeto.

In addressing petitioner Lam to determine whether he was making the plea knowingly and voluntarily, the Court made no reference to the fact that Gerber represented both petitioner Lam and co-defendant Szeto. The Court did not ask either Gerber or Lam whether they had discussed the possibility

of a conflict of interest in the jont representation, or whether Lam knew of his constitutional right to separate counsel (P. Tr. 34).

Sentencing was scheduled for July 26, 1973. At the sentencing, the Court again made no reference to the joint representation, and did not inquire into its propriety.

At no time during Gerber's representation of the two co-defendants did he ever advise them that they had a right to separate counsel, or that there was a potential conflict of interest in the joint representation (H. Tr. 24, 69; A-10). Lam first learned of his right to separate counsel in December, 1975, when a fellow inmate at the United States Penitentiary in Lewisburg, Pennsylvania gave him a law book to read (H. Tr. 24). Lam filed this motion to vacate sentence shortly thereafter.

ARGUMENT

At the time that petitioner Lam's guilty plea was entered, the District Court was obliged, but failed, to

> "conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views."

United States v. Alberti, 470 F.2d 878, 881-882 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973); see also, United States v. DeBerry, 487 F.2d 448, 453 (2d Cir. 1973); United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975); United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir., November 3, 19[illegible]).

This Court mandated this inquiry, for all joint representation cases, in United States v. Alberti, supra, decided more than five months before the entry of Lam's plea.

Because the District Court failed to conduct this inquiry,* the Government must bear the burden of proving, in

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* The failure to inform petitioner Lam of his right to separate counsel does not rest on the Court alone. Although the Court was under an obligation to conduct the inquiry on its own initiative, both Gerber and Assistant United States Attorney Walton should have specifically brought the matter to the Court's attention.

cont'd. p. 13

this Section 2255 proceeding, that petitioner Lam was not prejudiced by the joint representation. United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972), approved and adopted by this Circuit in United States v. DeBerry, 487 F.2d 448, 453 n. 6 (2d Cir. 1973). See United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir., November 3, 1976, slip opinion at 393).

The evidence adduced before the Court below, and that contained in the transcripts from the entry of petitioner Lam's plea, established that Lam's counsel was burdened by a conflict of interest, and that that conflict denied Lam effective assistance of counsel.

The conclusion of the Court below that there was no conflict of interest, and that Lam was not prejudiced, resulted from a misreading of the record, and an application of an improper rule of law.

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footnote cont'd from p. 11

In fact, in United States v. Lovano, 420 F.2d 769, 773 n. 13 (2d Cir.), cert. denied, 397 U.S. 1071 (1970), United States v. Wisniewski, 478 F.2d 274, 281 (2d Cir. 1973), and United States v. Vowteras, 500 F.2d 1210, 1211 (2d Cir.), cert. denied, 419 U.S. 1069 (1974), the United States Attorney directed the Court's attention to the possible conflict of interest, and thus ensured that the Court made appropriate inquiry. Here, the Assistant United States Attorney "who ought not to lead courts into errors," Taylor v. United States, 487 F.2d 307, 308 (2d Cir. 1973), was silent, and thus invited the error which the Court made.

I.

LAM'S COUNSEL
HAD A CONFLICT OF INTEREST

Petitioner Lam was advised to plead guilty by counsel who had already advised a co-defendant to plead guilty, and who believed that that co-defendant's guilty plea would not be accepted by the United States Attorney, or by the Court, unless Lam also pled guilty. This is a classic conflict of interest, contrary to a lawyer's responsibility to

> "exercise independent professional judgment on behalf of his client. ... Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

ABA Code of Professional Responsibility, Canon 5; EC 5-1. See also United States v. Truglio, 493 F.2d 574, 580 (4th Cir. 1974). Having concluded that it was in Szeto's best interests to plead guilty, Gerber believed that he could only serve Szeto's interests if Lam, as well, changed his plea to guilty.

While the Court below apparently credited Gerber's testimony of his understanding of the practice of the United States Attorney in multi-defendant cases, the Court held that that understanding did not produce a conflict of interest. The Court stated,

> "The most logical inference from the fact that Szeto had failed to plead guilty and Mr. Gerber's belief as to the practice of the United States Attorney would be that

> Mr. Gerber would have no motivation to induce a plea from Mr. Lam since he believed that it would not have been agreed to anyway."

(A-9).

It is respectfully submitted that this inference, drawn by the Court below, was based on a misreading of the transcript of May 31, 1973, the day petitioner Lam's and co-defendant Szeto's trial was to commence.

The Court below correctly noted that Szeto's guilty plea had been rejected by the District Court on the morning of May 31, 1973. However, the Court below was incorrect in inferring from that fact the conclusion that Gerber believed that he would be unable to enter guilty pleas for Szeto and Lam. The record indicates precisely the contrary.

Almost immediately after the District Court declined to accept Szeto's plea (P. Tr. 14), Gerber approached the bench and informed the Court that he was still attempting to convince both Lam and Szeto to plead guilty (P. Tr. 15). Gerber stated that he was "beginning to get across to Lam the fact he ought to plead [guilty]," and added that "under those circumstances," he thought he could convince Szeto to plead guilty (P. Tr. 15-16). When the Court then directed the attorneys to select a jury, Gerber became insistent on his desire to enter guilty pleas. He stated, "We can get rid of it, Judge." (P. Tr. 16). Thus, contrary to the inference drawn by the Court below, Gerber

consistently believed that Szeto would be allowed another opportunity to plead guilty in the afternoon -- and that the Court would accept Szeto's plea if Lam also pled guilty.

The inference drawn by the Court below, which led to its conclusion that there was no conflict, was thus based on a simple misreading of the record, and is clearly erroneous. United States v. Pfingst, 490 F.2d 262, 273 (2d Cir. 1973), cert. denied, 417 U.S. 919 (1974).

Far from supporting an inference that Gerber would not coerce Lam into pleading guilty, Gerber's understanding of the United States Attorney's practice produced a conflict of interest under which Gerber believed that he could only serve Szeto's best interests, and have Szeto's guilty plea accepted by the Court, if he convinced Lam to plead guilty.*

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* It should be noted that while Lam testified that Gerber told him that he would "hurt Szeto" by going to trial (H. Tr. 15), Lam did not understand this to mean that Szeto would be unable to enter a guilty plea unless Lam also did so. Instead, Lam thought that if he went to trial, the evidence presented in his trial could inculpate Szeto in a narcotics conspiracy (H. Tr. 15-16). Lam, who did not know what a pre-sentence report was (H. Tr. 16), understood that the presentation of this testimony in his trial would cause the Judge to impose a harsher sentence on Szeto, whether or not Szeto pled guilty or went to trial (H. Tr. 15-16). Gerber thus succeeded in conveying to Lam his belief that if Lam went to trial, Szeto would not "receive any benefit" from a guilty plea (H. Tr. 20). Lam misunderstood why Gerber believed this would occur. The misunderstanding is not surprising because Lam, at the time of his plea, understood little English, and Gerber never used an interpreter in speaking with him (H. Tr. 9-10, 68; A-8, A-9).

II.

LAM WAS PREJUDICED BY HIS COUNSEL'S CONFLICT OF INTEREST, AND WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner Lam pled guilty in reliance upon advice from his counsel which was tainted by a conflict of interest.

According to Gerber's view, his advice to Lam to plead guilty was part of a "package plea bargain," under which Szeto was allowed to plead guilty only because Lam -- in Gerber's words -- "accepted the inevitability and advisability of pleading guilty." (H. Tr. 88).

It is a denial of the Sixth Amendment right to effective assistance of counsel for an attorney representing two defendants to enter into, or for a court to accept a "package plea bargain," under which the acceptance of one defendant's guilty plea depends upon whether another defendant pleads guilty. See United States v. Truglio, 493 F.2d 574, 580 (4th Cir. 1974) (package plea bargain involving five co-defendants represented by same counsel; district court abused discretion in denying permission to one defendant to withdraw plea); see also, United States v. Mari, 526 F.2d 117, 120 (2d Cir. 1975) (Oakes, J., dissenting).

While the Assistant United States Attorney did not intend his plea negotiations with Gerber to be a "package plea

bargain,"* that intent is immaterial, because it was Gerber's understanding of the process that controlled the advice to plead guilty which he gave to the petitioner. The impact on petitioner Lam was the same that it would have been if the Assistant United States Attorney and Gerber had, in explicit terms, entered into a "package plea bargain" which allowed Szeto to plead guilty only if Lam also pled guilty.

Mr. Lam's reliance, in pleading guilty, upon the advice of counsel burdened by a conflict of interest, is a "specific instance of prejudice," as required in this Circuit to establish a denial of effective assistance of counsel. United States v. Carrigan, Docket Nos. 74-2056, 2057 (2d Cir., November 3, 1976, slip opinion at 392-393); United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975); United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970).

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* At the request of the Government, after the conclusion of the hearing below, it was stipulated that if Assistant United States Attorney Walton were called as a witness, he would testify that:

> "At no time did he ever represent to Gustave Gerber, attorney for Petitioner Lam Man Chung and for Szeto To Suey Nom, a co-defendant, that the acceptance of a guilty plea by one defendant would in any way be conditioned upon the willingness of any other defendant also to plead guilty at that or at any other time, but at no time did he ever represent that this was not the case." (emphasis added)

The conclusion of the Court below (A-9) that it was "more logical" that Lam pled guilty because of the strength of the Government's case against him, rather than because of advice of counsel tainted by a conflict of interest, resulted from the application of an improper standard of law, and is erroneous. See United States v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973) (on habeas corpus appeal, the Court of Appeals' "function is limited to determining whether the district court ... properly applied controlling legal standards and, if so, whether its factual findings meet the test of Rule 52(b), F. R. Civ. P."). That conclusion, in essence, is simply a statement that there were reasons upon which competent counsel, untainted by a conflict of interest, might have advised Lam to plead guilty.

But this Court has rejected the approach that a denial of effective assistance of counsel may be overlooked if it is possible that the outcome, with effective counsel, would have been the same. As this Court held in United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir., November 3, 1976, slip opinion at 396-397),

> "The Government urges that its case was so strong that independent counsel for each defendant could not have changed the outcome.
>
> We cannot accept the proposition that the more potent the Government's case, the less compelling the criminal defendant's constitutional right to independent counsel.
>
> * * *

> Mr. Justice Murphy's observation [in Glasser v. United States, 315 U.S. 60, 76 (1942)] is particularly apt. 'The right to counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.'"

Lam was entitled to, and did not receive, his lawyer's undivided loyalty in considering whether to plead guilty. Von Moltke v. Gillies, 332 U.S. 708 (1948); Glasser v. United States, 315 U.S. 60, 70, 75-76 (1942). The Fourth Circuit held, in vacating a guilty plea which was part of a package plea bargain,

> "Upon the record before us, we find that [the petitioner's] interests were so commingled with those of his [co-defendant] that it was impossible for [his lawyer] to devote his full efforts on behalf of [the petitioner]."

United States v. Truglio, 493 F.2d 574, 580 (4th Cir. 1974). The same conclusion is warranted here: because Gerber believed that the Court would only accept a guilty plea from Szeto if Lam also pled guilty, Gerber was unable to give Lam his undivided loyalty.

Gerber's advice to plead guilty, upon which Lam relied, was thus "outside the 'range of competence demanded of attorneys in criminal cases,'" Tollett v. Henderson, 411 U.S. 258, 268 (1973), which constitutes a denial of effective assistance of counsel.

> "Normal competency includes ... such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar."

United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973).

III.

LAM DID NOT WAIVE HIS RIGHT TO EFFECTIVE COUNSEL BY RETAINING HIS COUNSEL, OR BY PLEADING GUILTY.

Because petitioner Lam pled guilty in reliance upon advice tainted with counsel's desire to aid a co-defendant, Lam's guilty plea and sentence should be vacated. Lam did not waive his right to effective assistance of counsel by retaining his own counsel, or by pleading guilty.

A. Lam did not waive his right to counsel with undivided loyalties by retaining Gerber.

Lam's decision to retain Gerber as his lawyer (H. Tr. 7), and to suggest that Gerber also represent Szeto (H. Tr. 8-9), did not diminish or waive Lam's right to counsel with undivided loyalties.

Judge Lumbard recently noted, concurring in United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir., November 3, 1976, slip opinion at 398),

> "It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant."

The Ninth Circuit has expressed a broader view:

> "Most criminal defendants who can retain counsel are not in any position to judge the competence of the lawyer whom they hire. They have to take him on faith -- in reliance on the fact that he has been admitted to practice."

United States v. Marshall, 488 F.2d 1169, 1193 (9th Cir. 1973). See also United States v. McCord, 509 F.2d 334, 351 n. 63 (D.C. Cir. 1974), cert. denied, 421 U.S. 930 (1975); West v. Louisiana, 478 F.2d 1026, 1032-1034 (5th Cir. 1973).

Here, Gerber was the only lawyer whom Lam knew (H. Tr. 7). When Lam retained Gerber, and when Lam suggested that Szeto retain Gerber, Lam did not know that there was a potential conflict in a joint representation (H. Tr. 9). Gerber did not explain to Lam that he had a right to separate counsel (H. Tr. 69), even though the ABA Code of Professional Responsibility, DR 5-105(c) provides:

> "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

(emphasis added).*

This Court recently addressed this specific problem in United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir.,

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* In addition, the American Bar Association has taken the view since 1971 -- two years before Lam's plea -- that

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The

cont'd p. 24

November 3, 1976). There, this Court reversed convictions of two defendants who had retained the same counsel. The Court (Mulligan, C.J.) held:

> "The record discloses no discussion as to possible conflict initiated by the court, the Government or defense counsel. On this record we have no reason to believe that the choice of counsel here by either defendant was intelligently made with knowledge of any possible conflict."

Id., slip opinion at 397.

This Court should read the same conclusion here.

B. Lam did not waive his right to effective assistance of counsel by pleading guilty.

Lam's decision to plead guilty, based upon counsel's advice tainted by a conflict of interest, did not waive his right to effective assistance of counsel.

This is true whether or not the representations made by Gerber to Lam deprived Lam's plea of its voluntary character, because a claim for denial of effective assistance

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footnote cont'd from p. 23.

> potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

ABA Standards Relating to the Defense Function, § 3.5 (Approved Draft 1971) at 211, 213.

of counsel survives even a knowing and voluntary guilty plea, and warrants vacating that plea. Mosher v. LaVallee, 491 F.2d 1346, 1348 (2d Cir.), cert. denied, 416 U.S. 906 (1974); Tollett v. Henderson, 411 U.S. 258, 268 (1973).

In Mosher v. LaVallee, a habeas corpus proceeding, the District Court vacated a judgment of conviction on two independent grounds: (1) that the plea was involuntary because it was induced by assurances that the judge would give a minimum sentence, and (2) that the petitioner had been denied effective assistance of counsel. The District Court held that the denial of effective assistance of counsel was an independent ground to vacate the judgment of conviction, whether or not the plea had been knowing and voluntary. Mosher v. LaVallee, 351 F. Supp. 1101, 1111 (S.D.N.Y. 1972). This Court affirmed, and agreed that the "effective assistance of counsel" claim was not waived by the guilty plea, and was therefore an alternate ground for vacating the conviction. Mosher v. LaVallee, 491 F.2d 1346, 1348 (2d Cir.), cert. denied, 416 U.S. 906 (1974). See also United States v. Consiglio, 391 F. Supp. 564, 568 (D. Conn. 1975) (in a collateral attack on a plea, the petitioner may raise "the voluntariness of the plea and the adequacy or competence of the advice provided him by counsel").

A later opinion of this Court stated, in dicta, that a guilty plea "may well have been" a waiver of a claim that joint representation denied effective assistance of counsel. United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975). However, that opinion did not purport to overrule, and indeed, did not discuss LaVallee, which held the opposite. Moreover, the dicta in Mari was based on the "general principle [that] a guilty plea surrenders all defenses and all non-jurisdictional defects." United States v. Mari, supra, 526 F.2d at 119 n. 1. But that general principle does not support the dicta, for, as the Supreme Court held in Johnson v. Zerbst, 304 U.S. 458, 468 (1938), denial of a criminal defendant's right to effective assistance of counsel is a jurisdictional defect.* The Supreme Court held, per Mr. Justice Black,

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* The District of Columbia Circuit has made a distinction between "ineffective assistance of counsel, as opposed to ignorance of the right to counsel," holding that the latter is a jurisdictional defect while the former is only relevant "to the extent that it bears on the issues of voluntariness and understanding." Edwards v. United States, 256 F.2d 707, 709-710 (D.C. Cir.), cert. denied, 358 U.S. 847 (1958). However, the "ineffective assistance" claim in Edwards was not based on a claim of conflict of interest; it was merely based on counsel's failure to assert possible defenses. Where petitioner is denied effective assistance of counsel because of counsel's conflict of interests, petitioner is in the same position as if he had no counsel at all. Put another way, if petitioner is ignorant of his right to separate counsel, he is ignorant of his right to counsel.

> "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court -- as the Sixth Amendment requires -- by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus."

(footnotes omitted).

Thus, the dicta in Mari should not be held to disturb this Court's holding in LaVallee, supported by Johnson v. Zerbst, that denial of effective assistance of counsel, even if it does not alter the knowing and voluntary character of the plea, warrants vacating a guilty plea and sentence.

CONCLUSION

For the foregoing reasons, petitioner Lam Man Chung was denied effective assistance of counsel. The judgment of the District Court should be reversed, and the case remanded to the District Court with instructions to vacate petitioner's guilty plea and sentence so that petitioner may re-plead, with the assistance of counsel unburdened by a conflict of interest.

Dated: New York, New York
November 19, 1976

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAM MAN CHUNG,

Petitioner,

-against-

UNITED STATES OF AMERICA

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75 Civ. 6138

MEMORANDUM OPINION

GURFEIN, Circuit Judge:

Petitioner Lam Man Chung has submitted pro se several motions and supplemental motions to this court, all of which I treat as motions under 28 U.S.C. § 2255 to vacate his guilty plea and his sentence. The first motion submitted by petitioner is dated October 7, 1975[1] and challenges petitioner's plea of guilty on the grounds (1) that the court failed to ascertain a factual basis for his plea and (2) that the court failed to inform the petitioner of the provisions for a three-year special parole term required for his offense under 21 U.S.C. § 841. On December 11, petitioner filed a second motion under 28 U.S.C. § 2255 asserting the illegality of the ten-year (a)(2) sentence imposed upon him, on the basis that the parole board's subsequent consideration of petitioner under the terms of this sentence rendered the original sentence

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1. This petition may have been filed as late as December 8, 1975.

invalid under the doctrine of United States v. Slutsky, 514 F.2d 1222 (2 Cir. 1975). On January 29, 1976, the petitioner filed, under Rule 15(a) of the Federal Rules of Civil Procedure, a supplemental petition to the first petition, in which he alleges for the first time that his guilty plea was involuntarily entered due to the advice of counsel which impermissibly sought to influence the petitioner to plead guilty in order to benefit a co-defendant represented by the same counsel. Finally, some time in the middle of March, petitioner filed a duplicate of his December 11th petition to vacate his sentence, which has also been referred to me.

For the reasons stated hereinafter, all of petitioner's claims are rejected and the corresponding motions denied, with the exception of the claim set forth in his supplemental petition of January 29, 1976, on which claim I shall order that a hearing be held.

In July 1973 I sentenced petitioner, Lam Man Chung, to a term of ten (10) years on a plea of guilty to possession of narcotics with intent to distribute. Thereafter, Judge Morris Lasker imposed a sentence upon petitioner of five (5) years imprisonment under 18 U.S.C. § 4208(a)(2), to be served consecutively to the sentence I had previously imposed. In order to give the Parole Board as much discretion as possible, I amended my sentence to include eligibility for

parole by petitioner at any time the Parole Board saw fit under 18 U.S.C. § 4208(a)(2). The petitioner has had a parole hearing and has been set down for a second hearing at the expiration of one-third of his cumulative sentence. He now contends that the action of the Parole Board in setting over his second hearing to a time when he shall have served one-third of the combined consecutive sentences is illegal. Although a complaint directed at the action of the Board cannot properly be raised on a § 2255 motion, there is nothing illegal about the Parole Board's choice of time for reconsideration of parole release. Grasso v. Norton, 520 F.2d 27 (2 Cir. 1975). In Grasso, there was a single sentence. Here there is a consecutive sentence. When the Parole Board is required to review eligibility on one or more (a)(2) sentences at a time when one-third of the sentence has been served, that one-third means one-third of the cumulative sentence. Nor does the Parole Board's treatment of petitioner require his sentence to be vacated, since I was fully aware of the parole board's policy vis-a-vis (a)(2) sentences under the guidelines at the time I modified the sentence. Compare United States v. Slutsky, supra.

Petitioner Chung also filed a motion to vacate a plea of guilty on the grounds that I failed to ascertain the factual basis for his plea. This claim has no merit. A review of the record shows that through questioning, the

defendant stated in his own words that he had committed the offense charged and on the date specified in the indictment. Moreover, the other papers before me indicated that substantial evidence had been acquired by investigators to support a factual basis for the plea. At no point during the proceedings did the defendant Chung indicate that he was not guilty of the offense charged, or that any element of the offense was absent. Cf. Rizzo v. United States, 516 F.2d 789 (2 Cir. 1975).

Petitioner's claim that I failed to advise him of the three-year special parole term requirement is frivolous. At the plea-taking proceeding held on May 31, 1974, at page 6 of the transcript, the following colloquy occurred:

> "Q. I want you to realize on your plea of guilty the court has the power to impose sentence on you of up to 15 years' imprisonment and a fine of $25,000, plus a special parole term of three years. Do you understand that?
>
> "A. Yes.
>
> "Q. And you wish to plead guilty?
>
> "A. Yes."

I believe that this questioning fully complied with the requirements set forth by this court in Michel v. United States, 507 F.2d 461, 463 (2 Cir. 1974).

However, I am not certain that the records and files before me "conclusively" show that petitioner is unentitled to relief on the claim first raised in his supplemental petition. 28 U.S.C. § 2255. In this supplemental petition, petitioner alleges that:

> "During the course of the trial strategy meetings it was determined by counsel that the Government had a 'solid' case against Mr. Nom [a codefendant] and he should change his plea of not guilty to guilty; while Mr. Lam's trial assessment was that of having more of an opportunity for victory than Mr. Nom's. Further, it was then realized by counsel that, if Mr. Lam commences to trial and is not victorious, then Mr. Nom would probably receive a greater sentence than he would have if he pled guilty. Even further, Mr. Lam was placed in the untenable position of being the potential cause of his co-defendant receiving a greater sentence if he, Mr. Lam, proceeded to go to trial. That is why Mr. Lam's plea of guilty was "Involuntarily entered, against his desire to plead 'not guilty,' but following the advice of counsel who was common to both defendants. The defendant's interest was not protected by counsel, while counsel was also trying to protect the interest of Mr. Nom."

In addition, petitioner's co-defendant, Suey Nom Szeto, has submitted an affidavit supporting the allegations of petitioner's supplemental petition.

At the request of the court, the government has responded with an affidavit by the attorney who represented both defendants, Gustave Gerber, and with a brief urging that the assertions of the petition do not raise sufficiently substantial issues of fact to require that a hearing

under § 2255 be held. As a matter of discretion I will order a hearing on the theory that there may be factual issues which cannot be determined by affidavit. See Taylor v. United States, 487 F.2d 307 (2 Cir. 1973). Accordingly, I order that the government be ready and produce the petitioner for an evidentiary hearing to be held as soon as the parties and the court can agree on a date. Counsel will be appointed for the petitioner in the event that he is unable to retain counsel for himself.

So ordered.

Dated: April 6th 1976

MURRAY I. GURFEIN, United States
Circuit Judge, Sitting by Designation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BILL LAM, a/k/a LAM MAN CHUNG, :

Plaintiff, :

- against - :

UNITED STATES OF AMERICA, :

Defendant. :

----------x

OPINION

75 Civ. 6138

#44727

HENRY F. WERKER, D. J.

Pursuant to the memorandum opinion of April 6, 1976 of the Honorable Murray I. Gurfein, sitting as a district judge by designation, a hearing was held on June 22, 1976 with regard to the petitioner's motion under 28 U.S.C. § 2255 to vacate his guilty plea and sentence. The issue upon which a hearing was directed to be held was petitioner's claim that he had been denied the effective assistance of counsel because the attorney representing both petitioner and his co-defendant, Szeto Suey Norn ("Szeto"), advised the petitioner to plead guilty so that his co-defendant would receive a lighter sentence. Petitioner claims that if Szeto had pled but petitioner had gone to trial, the evidence which would have come out at petitioner's trial would have resulted in Szeto's receiving a heavier sentence. An affidavit submitted by Szeto supports these contentions and the government has stipulated that if it produced Szeto, he would testify to the same effect as the petitioner.

The petitioner was sentenced to a term of ten years on a plea of guilty to possession of narcotics with intent to distribute. In addition, he received a sentence of five years from Judge Lasker on an unrelated offense which was to be served consecutively upon completion of the first sentence.

I conclude on the basis of the testimony that there is no basis for petitioner's claim.

To begin with, petitioner was no stranger to the criminal justice system prior to his plea to this indictment, and was therefore not unaware of his right to the effective assistance of counsel. In 1966, he pled guilty to a charge of possession of firearms, served a jail sentence on a charge of vagrancy and pled guilty to a charge of illegal entry into Canada, where, after serving a sentence of a few days, he was deported. He was charged with three other crimes prior to his plea to the indictment in question.

I find Mr. Gerber to have been competent counsel. In the three previous instances in which he represented petitioner, he managed to obtain a dismissal of the charges, in two of the cases by moving to suppress the evidence. In none of these previous cases had he advised the petitioner to plead guilty. In this indictment, Mr. Gerber advised the petitioner to plead guilty only after he was himself convinced of the petitioner's guilt after having conducted a careful investigation and concluding that the petitioner was himself a drug user and had been involved in the crime alleged. Prior to that time Mr. Gerber echoed Mr. Lam's denial of guilt to the Assistant United States Attorney. Mr. Gerber testified that he had tried approximately two to three hundred criminal cases in his forty years of practice and that guilty pleas were taken in relatively few of these cases.

Furthermore Szeto was initially referred to Mr. Gerber by the petitioner himself since Szeto did not know an attorney and was seeking a reduction in bail in order to secure his release from jail. The attorney testified that he met individually with Mr. Lam on numerous occasions, alone with Szeto on three or four occasions and with both defendants together several times. Although in May of 1973 the petitioner could understand some English but not everything, Mr. Gerber

testified that he communicated with the petitioner in English and that Mr. Lam translated at times for Szeto. It was conceded that Mr. Gerber made no representations to Mr. Lam that he would receive a sentence less than fifteen years prior to the plea, although he intimated that it might be possible that the sentence might be one related to a drug rehabilitation center in view of both defendants' alleged use of drugs.

I find it incredible that Mr. Gerber advised the defendant to plead guilty to make it easier for his co-defendant since they pled guilty to different counts and each count to which each pled guilty did not involve the other. Mr. Szeto plead to counts 3 and 8 and Mr. Lam to count 7. Had the defendants gone through the trial the result might have been otherwise because both of them were named together in several of the many counts in the indictment. On the morning of May 31, 1973, the date of the plea, Szeto appeared ready to plead but since he refused to adequately indicate the factual basis of his guilt on the record, Judge Gurfein refused to accept the plea. Mr. Gerber testified that it was his understanding that in multiple defendant cases the United States Attorney was unlikely to agree to accept a plea from just one defendant.[1] The most logical inference from the fact that Szeto had failed to plead guilty and Mr. Gerber's belief as to the practice of the United States Attorney would be that Mr. Gerber would have no motivation to induce a plea from Mr. Lam since he believed that it would not have been agreed to anyway.

I furthermore find it incredible that this defendant would have been willing to risk a possible sentence of fifteen years, three years of special parole and a $25,000 fine merely to prevent his co-defendant from getting a stiffer sentence. The more logical explanation for both pleas was the fact that the Assistant United States Attorney had made his opening remarks before the lunch recess, that 18 U.S.C. § 3500 material was furnished to defendants' counsel before lunch and that

counsel during lunch made defendants aware of what the government witnesses would testify to and how strong the government's case actually was. Mr. Gerber indicated that he believed it would be to his client's benefit to plead guilty once he had convinced himself of his client's guilt because his sentence was likely to be lighter than if he went to trial. Finally, I find credible the testimony of Mr. Gerber to the effect that he never advised Mr. Lam to plead so that Szeto would benefit thereby.

I also find that Mr. Gerber never discussed with the defendants the possible conflict of interest or the right to be represented by independent counsel. Mr. Gerber did testify that as a result of his investigation he believed there was no conflict.

It would have been more prudent had the district court conducted a preliminary voir dire before the jury was empanelled or any pleas taken as to the possibility of a conflict of interest to avoid the sort of application which has been made here. United States v. Berry, 487 F.2d 448 (2d Cir. 1973). However, on the basis of the evidence which has been adduced, I find no merit to the contention that a conflict of interest did exist in the representation of both defendants by Mr. Gerber at the time the pleas were taken or that the petitioner was denied the effective assistance of counsel.

These are the findings of fact and conclusions of law required by Rule 52, Federal Rules of Civil Procedure.

Motion denied.

SO ORDERED.

DATED: New York, New York

July 7, 1976

Henry F. Werker
U. S. D. J.

BILL LAM, a/k/a LAM MAN CHUNG v. UNITED STATES OF AMERICA
75 Civ. 6138 (HFW)

NOTES

1. The parties have stipulated that if called, Robert Walton, the Assistant United States Attorney in charge of the case which is the subject of this Section 2255 motion, would testify that it was not the policy of the United States Attorney's Office to require that any co-defendant plead as a condition for accepting a guilty plea from one defendant and that no representation was made with respect to these particular defendants to Mr. Gerber that the acceptance of one plea would be conditioned on the acceptance of the other, nor was any representation made that this was not the case. The relevant point for our purposes here is Mr. Gerber's belief that such a policy existed in that this is probative of the fact that he would not have caused petitioner to plead guilty.

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